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IN THE

Supreme Court of the United States

No. 476

WILLIAM BROCKMUELLER, *Petitioner,*

vs.

STATE OF ARIZONA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA

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INDEX

Page

Petition for Writ of Certiorari 1

APPENDIX

Section 13-821 Arizona Revised Statutes 1A

Section 13-822 Arizona Revised Statutes 3A

Opinion of the Supreme Court of the State of Arizona 5A

Reporter's Transcript 9A

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA

The petition of WILLIAM E. BROCKMUELLER, respectfully represents:

That your petitioner was convicted of the crime of "contributing to the delinquency of a minor," as defined in Section 13-822 A.R.S. (1956), (appendix a) and this conviction in the Superior Court of the State of Arizona, in and for the County of Maricopa, Cause No. 31568, was appealed to the Supreme Court of the State of Arizona. In that appeal, No. 1131 (not yet reported), the conviction was upheld. A motion for rehearing was subsequently denied.

The opinion was rendered June 17, 1959, (appendix b) and the subsequent motion for rehearing was denied and the mandate issued on July 14, 1959.

This petition is submitted pursuant to the authority of Title 28, Section 1257 of the United States Code, and Rule 38 of the Supreme Court Rules.

The only question presented for review herein is the constitutionality of Section 13-821 A.R.S. (1956) when construed in view of the provisions of the "due process" clause of the XIVth Amendment of the Constitution of the United States, Section 1, ". . . nor shall any state deprive any person of life, liberty or property, without due process of law."

The question of the constitutionality of the Statute in question herein was raised during the trial in the lower court, by a motion for a directed verdict at the close of the State's case, upon the grounds that the Statute was unconstitutional and violative of the provisions of the XIVth Amendment to the Constitution of the United States of America, and was re-urged upon a motion for arrest of judgment. (appendix c)

This argument was likewise urged upon appeal to the Supreme Court of the State of Arizona.

Your petitioner respectfully submits that he has exhausted all remedies available to him in the Courts of the State of Arizona; that he has no avenue of relief available to him, except to have this Honorable Court review the proceedings had in the Superior Court of the State of Arizona and the Arizona Supreme Court. The Statute, which your petitioner was convicted of violating, does not establish a reasonable standard of guilt, and either forbids or requires the doing of acts in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.

This, petitioner submits, violates the first principal of due process of law.

WHEREFORE, petitioner respectfully prays that this Honorable Court enter its Order granting a Writ of Certiorari herein, and authorizing and directing the Clerk of this Court to forthwith notify the Supreme Court of the State of Arizona, the Superior Court of the State of Arizona, in and for the County of Maricopa, and counsel of record of the granting of this petition.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX A

Section 13-821 A.R.S.—DEFINITIONS:

A. In this article, unless the context otherwise required:

1. "Dependent person" means a person under the age of eighteen years:

(a) Who is found begging, receiving or gathering alms, whether actually begging or under the pretext of selling or offering anything for sale.

(b) Who is found in a street, road or public place for the purpose of begging, gathering or receiving alms.

(c) Who is a vagrant.

(d) Who is found wandering and not having a home, or a settled place of abode, or a guardian or any visible means of subsistence.

(e) Who has no parent or guardian willing to exercise, or capable of exercising, proper parental control over him.

(f) Who is destitue.

(g) Whose home, by reason of neglect, cruelty or depravity of his parents, or either of them, or on the part of his guardian, or on the part of the person in whose custody or care he may be, is an unfit place for such person.

(h) Who frequents the company of reputed criminals, vagrants or prostitutes.

(i) Who is found living or being in a house of prostitution or assignation.

(j) Who habitually visits, without parent or guardian, a saloon, or place where spirituous, vinous or malt liquors are sold, bartered or given away.

(k) Who persistently refuses to obey the reasonable orders or directions of his parent or guardian.

(l) Who is incorrigible, that is, beyond the control and power of his parents, guardian or custodian by reason of the vicious conduct or nature of the person.

(m) Whose father is dead, or has abandoned his family, or is an habitual drunkard, or whose father or mother does not provide for such person, and it appears that such person is destitute of a suitable home or adequate means of obtaining an honest living, or who is in danger of being brought up to lead an idle, dissolute and immoral life, or when both parents are dead, or the mother or father, if living, is unable to provide proper support and care of such person.

(n) Who habitually visits, without parent or guardian, a billiard room or pool room.

(o) Who, being not over the age of fourteen years, refuses to attend public or private school, as directed by his parent, guardian or legal custodian.

(p) Who habitually uses intoxicating liquors as a beverage, or habitually smokes cigarettes, or uses

opium, cocaine, morphine or other similar drugs without direction of a competent physician.

(q) Who from any cause is in danger of growing up to lead an idle, dissolute or immoral life.

B. "Delinquent person" includes any person under the age of eighteen years who violates a law of this state, or an ordinance of a county, city or town defining crime.

C. "Delinquency" means any act which tends to debase or injure the morals, health or welfare of a child.

Section 13-822, A.R.S.—Contributing to delinquency and dependency; punishment; procedure.

A. A person who by any act, causes, encourages or contributes to the dependency or delinquency of a child, as defined by Sec. 13-821, or who for any cause is responsible therefor is guilty of a misdemeanor punishable by a fine not exceeding three hundred fifty dollars, by imprisonment in the county jail for not to exceed one year, or both.

B. The procedure and prosecution shall be the same as in other criminal cases.

C. When the charge concerns the dependency of a child or children, the offense for convenience may be termed contributory dependency, and when the charge concerns the delinquency of a child or children, the offense for convenience may be termed contributory delinquency.

APPENDIX B

Opinion of the Supreme Court

IN THE SUPREME COURT OF THE STATE OF ARIZONA

WILLIAM BROCKMUELLER, *Appellant,*

vs.

THE STATE OF ARIZONA, *Appellee.*

No. 1131

STRUCKMEYER, Justice.

Appellant appeals from a conviction for contributing to the delinquency of a minor, a violation of A.R.S. § 13-822.

The gist of appellant's first two assignments of error is the insufficiency of the evidence to show any conduct on his part which constitutes a violation of the statute. As indicated by the bill of particulars, the specific charge against him was that he actively urged one Patsy———, a seventeen-year-old girl, to allow certain motion pictures to be taken of her in the nude. Apellant argues that the evidence was insufficient to show such an urging or encouraging on his part. The record, however, indicates to the contrary.

All the events in question took place at a home in Phoenix, Arizona. The victim of the offense testified:

"Q. And then just what happened? Anybody else talking to you about taking them?

"A. Well, Bill said that is wasn't really bad.

"Q. Now, was he referring to the taking of the nude pictures?

"A. Yes.

"Q. You are speaking of Mr. Brockmueller? I wonder if you'd refer to him as Mr. Brockmueller, Bill Brockmueller, so we can get the whole name here?

"A. All right.

"Q. Then, Patsy, you did take some nude pictures?

"A. Yes."

A.R.S. § 13-822, states as follows:

"A person who by any act, * * * encourages * * * delinquency of a child, as defined by § 13-821, * * * is guilty of a misdemeanor."

Subsection C, A.R.S. § 13-821, defines "delinquency" as:

"* * * any act which tends to debase or injure the morals, health or welfare of a child."

These two sections, taken together, serve to prohibit the encouragement of any act which tends to debase or injure the morals, health or welfare of a child.

Appellant's argument that the statute is not violated unless the "encouragement" is so pronounced as to constitute an "aiding or abetting", has no application in this case. The evidence shows that appellant participated directly in encouraging the commission of the acts in question. This is all that the statute requires. Appellant's first two assignments of error are not well taken.

Appellant's third assignment of error is that the conviction is void, since the statute under which it was obtained is violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States, for the reason that the statute fails to establish a standard of guilt and fails to prescribe the conduct which is prohibited. Appellant argues that a conviction could be obtained for the doing of any act which might, at the moment, be in accordance with the notions of a judge or juries as to what was injurious to the morals, health, or welfare of a child. This argument was repudiated in Loveland v. State, 53 Ariz. 131, 86 P. 2d 942, wherein we held that the sections above quoted were not violative of the Constitution of the State of Arizona. However, appellant argues that the more recent case of Musser v. Utah, 333 U. S. 95, 92 L. Ed. 562, 68 S. Ct. 397, is authority for the proposition that this statute is violative of the Fourteenth Amendment to the Constitution of the United States. We do not agree. In the Musser case, the statute in question was completely dissimilar to the statute here involved.[1] It is of a type sometimes called "contra bonos mores", prohibiting the commission of any act detrimental to the public interest. The difference in scope is apparent. The Arizona statutes prohibit only the causing or encouraging of acts which have the effect of injuring the morals, health or welfare of a child. Such statutes have a long history of common-law interpretation which renders sufficiently clear and meaningful language which might otherwise be vague and uncertain.

---

1 Utah Code Anno 1943 § 103-11-1 (5): To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice or the due administration of the laws;—they are punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding $1,000.

Even in criminal statutes, the language adopted need not afford an interpretation approaching mathematical certainty. People v. Deibert, 117 Cal. App 2d. 410, 256 P. 2d 355. We hold that the Arizona statutes are sufficiently certain and definite to apprise men of ordinary intelligence of the conduct which the statute prohibits. Cf. State v. Roessler, 58 N. M. 102, 266 P. 2d 351.

Appellant's fourth assignment of error is unsupported by argument in the brief, and hence will be considered as having been abandoned.

The judgment is affirmed.

FRED C. STRUCKMEYER, JR.
Justice

APPENDIX C

Portion of Reporter's Transcript, page 73:

"MR. ROGERS: I have one further matter, if the Court please; I would like for the record to urge that this action be dismissed upon the grounds, further grounds, and for the reason that the Statute, Section 15-821, of the Arizona Revised Statutes, and Section—or, correction, 13-822, we are referring to specifically, that is the contracting—that is the contributing Statute, and that together with the following sections, considered with this one, the Statutes cited upon their face and as constituted and applied are wholly unconstitutional and violate the due process clause, the 14th Amendment.

"THE COURT: What is the last remark?

"MR. ROGERS: That the Statutes, as considered together, are unconstitutional and violative of the due process clause of the 14th Amendment.

"THE COURT: 13-822 is a pretty broad—

"MR. ROGERS: Yes, that's one of the bases, of course, for the claim that the Statute is unconstitutional, that it is vague and uncertain. I could dwell on that more if the Court would like to hear that at the present time."

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WILLIAM BROCKMUELLER,
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vs.

THE STATE OF ARIZONA,
Respondent.

No. 476

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No.....

WILLIAM BROCKMUELLER, Petitioner

v.

THE STATE OF ARIZONA, Respondent

OPINION BELOW

The opinion in this case was delivered by the Supreme Court of the State of Arizona on June 17, 1959, and is entitled "William Brockmueller, Appellant, vs. State of Arizona, Appellee". It is numbered 1133 and is reported in 86 Ariz....., 340 P. 2(d) 992 (Advance Pamphlet No. 3, August 7, 1959). Respondent agrees, as petitioner states, that a motion for a rehearing of the decision was denied and that the mandate of the Supreme Court of Arizona to the lower court issued on July 14, 1959, which gave finality to the decision.

JURISDICTION

Petitioner asserts jurisdiction under Title 28, Section 1257, United States Code, and Rule 38 of this Court.

HOW FEDERAL QUESTION IS RAISED

Petitioner questions the constitutionality o Arizona Revised Statutes (1956) § 13-822. The statute is copied in Appendix A of the Petition for Writ of Certiorari. Petitioner asserts that the statute contravenes the "due process of law" clause of the 14th Amendment to the Constitution of the United States, § 1, which provides:

" • • • nor shall any state deprive any person of life, liberty or property, without due process of law."

Petitioner states (p. 2, last paragraph) that the statute:

> " * * * does not establish a reasonable standard of guilt, and either forbids or requires the doing of acts in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."

Petitioner asserts that in the respect claimed the statute violates the constitutional provision invoked.

QUESTION PRESENTED FOR REVIEW

Petitioner further asserts that the statute invoked does not establish a reasonable standard of guilt, and either forbids or requires the doing of acts in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, and for such reasons petitioner claims the statute offends the due process clause of the 14th Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner was convicted of contributing to the delinquency of a minor female in violation of the statute above referred to by encouraging a seventeen-year-old girl to allow motion pictures to be taken of her in the nude. The applicable statutes are set forth in the opinion of the Supreme Court of the State of Arizona as follows:

> "A.R.S. § 13-822, states as follows:
>
> 'A person who by any act, * * * encourages * * * delinquency of a child, as defined by § 13-821, * * * is guilty of a misdemeanor.'
>
> A.R.S. § 13-821, Subsection C. defines 'delinquency' as:
>
> ' * * * any act which tends to debase or injure the morals, health or welfare of a child.' "

Following the quotations, the decision continued:

> "These two sections, taken together, serve to prohibit the encouragement of any act which tends to debase or injure the morals, health or welfare of a child.
>
> Appellant's argument, that the statute is not violated unless the 'encouragement' is so pronounced as to constitute an

'aiding or abetting', has no application in this case. The evidence shows that appellant participated directly in encouraging the commission of the acts in question. This is all that the statute requires. * * * "

Petitioner's objection in the state Court to the statute involved was stated by the Supreme Court of Arizona as follows:

"Appellant's third assignment of error is that the conviction is void, since the statute under which it was obtained is violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States, for the reason that the statute fails to establish a standard of guilt and fails to prescribe the conduct which is prohibited. Appellant argues that a conviction could be obtained for the doing of any act which might, at the moment, be in accordance with the notions of a judge or juries as to what was injurious to the morals, health, or welfare of a child. * * * "

That argument, as the decision of the Supreme Court of the State of Arizona discloses, was previously repudiated in *Loveland* v. *State*, 53 Ariz. 131, 86 P.2(d) 942. However, the petitioner invoked the subsequent decision of this Court in *Mussur* v. *State of Utah*, 333 U.S. 95, 68 S.Ct. 397, 92 L.Ed. 562. The Supreme Court of Arizona distinguished the Mussur decision because the Utah statute there construed was completely dissimilar to the statute here involved.

REASONS FOR DENYING THE WRIT

The Supreme Court of Arizona, as shown above, has twice sustained the statute as against the contention that the statute fails to establish a standard of guilt and fails to intelligently describe the conduct which is prohibited.

I

Leaving for the moment the federal constitutional question, this Court will accept the construction placed upon the statute by the Supreme Court of the State of Arizona, and, as construed by that Court, the statute, contrary to the assertion of petitioner, does establish a reasonable standard of guilt, and does not forbid or require the doing of acts in terms so vague that men of common

intelligence must necessarily guess at the meaning of the statute and differ as to its application. In *Morehead* v. *New York ex rel Tipaldo*, 298 U.S. 587, this Court said:

> " * * * This court is without power to put a different construction upon the state enactment from that adopted by the highest court of the State. We are not at liberty to consider petitioner's argument based on the construction repudiated by that court. The meaning of the statute as fixed by its decision must be accepted here as if the meaning had been specifically expressed in the enactment. Supreme Lodge, K. P. v. Meyer, 265 U.S. 30, 32, 68 L.ed. 885, * * * "

The Supreme Court of Arizona, by its decision, considered and disposed of petitioner's claim that the conviction is void because the statute under which it was obtained violates the due process clause of the 14th Amendment to the Constitution of the United States. The conviction may stand notwithstanding the asserted constitutional objection because the state Court, by its opinion, and by a previous opinion, has held that the statute does not fail to establish a standard of guilt and does not fail to describe the conduct which is prohibited. Thus the Supreme Court of Arizona has twice decided, contrary to the assertion of petitioner, that the statute is not so vague that an offense may not be charged and prosecuted under it.

II

The decision of the Supreme Court of Arizona rests in part on a non-federal question, which in itself is sufficient to support its decision, regardless of the federal constitutional question decided. This Court in *Flournoy* v. *Wiener*, 321 U.S. 253, addressing itself to the question said:

> "Any determination which we might make of the Fifth Amendment question would thus leave unaffected the state court's judgment brought here for review. Our opinion on that subject would be advisory only, since there is nothing before us on which we could render a decision that would have any controlling effect on the rights of the parties. Hence the case stands in the same posture as those in which we have repeatedly held that where the judgment of a state court rests in part on a non-federal ground adequate to support it, this Court will

not consider the correctness of the decision which the state court also made of a federal question otherwise reviewable here. Berea College v. Kentucky, 211 U.S. 45, 53, 53 L.ed. 81, 85, 29 S.Ct. 33; Enterprise Irrig. Dist. v. Farmers Mut. Canal Co. 243 U.S. 157, 163, 164, 61 L.ed. 644, 648, 649, 37 S.Ct. 318; Lynch v. New York, 293 U.S. 52, 54, 55, 79 L.ed. 191-193, 55 S.Ct. 16; Fox Film Co. v. Muller, 296 U.S. 207, 210, 211, 80 L.ed. 158-160, 56 S.Ct. 183. In such a case this Court has said that it will not enter 'a useless and profitless reversal' 'where the same judgment will be rendered by the court below, after they have corrected the error in the federal question.' Murdock v. Memphis, 20 Wall (US) 590, 634, 635, 22 L.ed. 429, 443, 444."

CONCLUSION

Respondent respectfully suggests that this Court does not have jurisdiction to review the decision of the Supreme Court of Arizona brought in question by the petitioner herein, because:

1. The construction of the state statute of the Supreme Court of Arizona will be accepted by this Court, the effect of which is that the statute as construed by the highest court of the State of Arizona is in direct conflict with the construction which petitioner requests this Court to place upon the statute.
2. The decision of the highest court of the State of Arizona rests in part on a non-federal ground adequate to support the decision independent of the constitutional objection raised by the petitioner.

It is respectfully urged that the petition for writ of certiorari be denied.

Respectfully submitted,

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